of both views. On the other hand, Lord BLACKBURN recognized that it is settled law that a change of possession will take a case out of the Statute of Frauds, but he regards this as an anomaly and refuses to extend it to cases in which there is no change of possession. This is a limitation of the first theory.

When the plaintiff has rendered ordinary personal or professional services, the value of which can be readily estimated, his injury is not irreparable, and specific performance should be denied under any of these theories. Where the services are very personal, however, such as the care of an aged person, especially when it necessitates an abandonment by the plaintiff of his business or his home, it is no doubt just to grant specific performance. As POMEROY says: "There are things which money cannot buy; a thousand nameless and delicate services and attentions incapable of being the subject of explicit contract, which money with all its peculiar potency, is powerless to purchase." T. E. A.

WHAT CONSTITUTES INTERSTATE COMMERCE UNDER THE FEDERAL EMPLOYERS LIABILITY ACT OF 1908?—The material provisions of the act are "That every common carrier by railroad while engaged in commerce between any of the several states or territories * * * shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce * * * for such injury or death, resulting in whole or in part from the negligence of any of the officials, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines * * *" COMPILED STATUTES 1913, §§ 8657-8665. As stated in the case of *Pederson* v. *Delaware, L. & W. R. Co.*, 197 Fed. 537, 117 C. C. A. 33, "the object of this act was to broaden the right to relief for damages suffered by railroad employees in interstate transportation." This act, unlike the one condemned in *Employer's Liability Cases*, 207 U. S. 463, 28 Sup. Ct. 141, 52 L. Ed. 297, deals only with the liability of a carrier engaged in interstate commerce (*Mondou* v. *New York, N. H. & Hartford Co.*, 223 U. S. 1, 38 L. R. A. N. S. 44, 32 Sup. Ct. 169, 56 L. ed. 327), the old one being condemned because of its being an attempt to regulate liability for injuries not only from interstate traffic, but also from intrastate traffic. And to recover, plaintiff must not only be employed by such interstate carrier, but must himself have a real and substantial connection with the interstate commerce in which the carriers and their employees are engaged; it is on this question—the relation of the plaintiff himself to such interstate commerce—that most of the cases turn in the interpretation of the statue. *Pedersen* v. *Delaware &c. Co., supra.* The court must find that he himself was at the time of the injury engaged in interstate commerce. *Lucchetti* v. *Philadelphia & R. Ry. Co.*, 233 Fed. 137.

An engineer hauling cars engaged in both interstate and intrastate commerce was held by the North Carolina Supreme Court to have been engaged in interstate commerce in *Horton* v. *Seaboard Air Line Ry.*, 157 N. C. 146, 72 S. E. 958. And it is settled that if one is engaged at the time in inter-

state commerce, the fact that at the same time he is engaged in intrastate commerce will not put him beyond the protection of the statute. Accordingly it is held that a brakeman on a train containing cars loaded with interstate freight is engaged in "interstate commerce" within the act, even though the train runs only between intrastate points. *Waters* v. *Guile*, 234 Fed. 532; *Behrens* v. *Ill. Cent. R. Co.*, 192 Fed. 581. The North Carolina courts hold *contra* to this, however, in the case of *Zachary* v. *North Carolina R. Co.*, 156 N. C. 496, 72 S. E. 858, holding that a fireman killed while attending his engine, which was about to haul some freight which was interstate commerce, was not so engaged in interstate commerce, as his run was to have been wholly intrastate. In *Van Brimmer* v. *Texas & P. Ry.*, 190 Fed. 394, it was held that a brakeman injured while making a flying switch to set out a car transported wholly in interstate traffic was not within the statute, even though such car were a part of a train carrying both interstate and intrastate commerce. This can be reconciled with the later case of *Waters* v. *Guile, supra,* only upon the theory that at the time of the inury the plaintiff was engaged, not as a brakeman on the train, but simply as to the one car which was at the time being "spotted." Otherwise it is in accord with the North Carolina case above. In case the brakeman is injured while "spotting" a car which itself is being shipped to another state, even though it be at the time a part of an intrastate train, there can be no doubt but that he is within the protection of the statute. *Rich* v. *St. Louis & S. F. R. Co.*, 166 Mo. App. 397, 148 S. W. 1011; *Nashville, C. & St. L. R. Co.* v. *Banks*, 156 Ky. 609, 161 S. W. 554. In *Montgomery* v. *Southern Pacific Co.*, 64 Ore. 597, 131 Pac. 507, the Oregon supreme court held that members of a switching crew engaged in switching cars loaded, or to be loaded, with interstate commodities, and injured while hauling them to another place within the state, from which an interstate train could more conveniently take them, were engaged in interstate commerce.

Where a shipment from one point to another, both within the state, in the course of transportation passed through another state, it was held to be an interstate shipment within the statute. *Louisville & N. R. Co.* v *Allen*, 152 Ky. 145, 153 S. W. 198.

Where an employee engaged in interstate commerce has been ordered to report, or by custom or necessity does so, and is injured while on his way to his post, the general rule is that he is at the time engaged in interstate commerce, and is protected by the statute. *Lamphere* v. *Oregon R. & Nav. Co.*, 196 Fed. 336; *Illinois Central R. Co.* v. *Nelson*, 203 Fed. 956; *Missouri, K. & T. Ry. Co. of Texas* v. *Rentz* (Tex. Civ. App. 1912), 162 S. W. 959.

An electric Interurban Railway is held to be a "railroad" within the statute. *Mc Adow* v. *Kansas City Western Ry. Co.* (Mo. App. 1914), 164 S. W. 188.

Where a railroad is engaged in transporting logs from a woods to a distant mill, within the state, the fact that such logs are there made into lumber which then becomes a part of interstate commerce does not bring such railroad within the statute as being engaged in interstate commerce. *Bay* v. *Merrill & Ring Lumber Co.*, 211 Fed. 717.

As regards employees working on instrumentalities which have not yet been used and made an actual part of a carrier's interstate system, the general rule seems to be that such employees are not engaged in interstate commerce within the statute. Such was the case in *Raymond* v. *Chicago, M. & St. P. Ry. Co.*, 233 Fed. 239, where a laborer working in a tunnel which, when completed, would be used by a railroad company engaged in both interstate and intrastate commerce, as part of its line, was held not within the statute, the reason being that there was no assurance that such tunnel would ever be completed, or even if it were, that it would ever be used and made a part of such interstate system. In *Thompson* v. *Columbia & P. S. R. Co.*, 205 Fed. 203, it was held that a workman killed while repairing a bridge on the line over which interstate commerce was carried by defendant was within the act, on the ground that such bridge had already been made a part of such interstate system. *Pedersen* v. *Delaware, etc. Co., supra,* was a case of an employee injured while laying an additional track over a bridge which had always supported other tracks used in interstate commerce by the defendant, and the court held that the plaintiff was not engaged in repairing the bridge, which was then a part of the interstate system, but was engaged in laying a new track, which had not yet become a part of such interstate system, and therefore not within the protection of the statute. The fact that he was injured by an interstate train was immaterial.

Regarding the nature of employees engaged in repairing instrumentalities of interstate carriers, which have already been used and made a part of such system, but which are for the time being out of such use, there is much conflict of opinion. In *Pierson* v. *New York, S. & W. R. Co.*, 83 N. J. L. 661, 85 Atl. 233, the New Jersey court said: "The final test is the relation of the employee's work to interstate transportation *at the time of the injury.* The repairing of an instrument of commerce, which is used sometimes in interstate transportation, whether it be the road-bed of a railroad, or a car or an engine which is run over it, is not an *engaging* in commerce, but a preparation for engaging therein in the future." The Wisconsin court, in *Ruck* v. *Chicago, M. & St. P. R. Co.*, 153 Wis. 158, says: "It is the use to which the appliance or instrumentality is put *at the time,* rather than the nature of the instrumentality itself, which determines whether or not it is employed in interstate commerce; and where such instrumentality at the time repairs are being made upon it, is not being used to facilitate interstate commerce, but is being repaired to make it ready for either inter- or intra-state use, as occasion may require in the future, an employee engaged in such repairs is not employed in interstate commerce within the meaning of the statute. He must be employed directly in transportation, or in some act directly facilitating such transportation." The decision in that case was that a railroad employee repairing cars at its repair shop when the cars are not *en route* is not within the statute.

On the other hand, it was held in *Montgomery* v. *Southern Pacific Co., supra,* that "all employees who participate in the maintenance or operation of the instrumentalities for the general use of an interstate railroad are en-

gaged in interstate commerce within the act. And DOHERTY, in his work on "THE LIABILITY OF RAILROADS TO INTERSTATE EMPLOYEES," speaking of what employees are included as "engaged in interstate commerce," says: " * * * mechanics, or car repairmen, while engaged in work upon interstate cars or other interstate instrumentalities, and while passing over the road for the purpose of making repairs upon cars or engines of an interstate train, are also included." And the great weight of decisions supports this latter view, that the control of Congress extends not only to the interstate commerce itself, but also to the control of the instrumentalities through which such commerce is carried on. That the following are included: a pumper of water for interstate trains, *Horton* v. *Oregon, Washington R. & Nav. Co.*, 72 Wash. 503, 130 Pac. 897, in which case the court said: "it is not the source of the injury which determines, but rather the *effect of the injury upon interstate* commerce;" one repairing the track of an interstate carrier, *Zikos* v. *Oregon R. & N. Co.*, 179 Fed. 893; one engaged in repairing a switch used both in inter- and intra-state traffic, *Colasurdo* v. *Cent. R. R. of N. J.*, 180 Fed. 832; one repairing a boiler regularly used in interstate traffic, in shops of railroad, *Law* v. *Cent. R. R. Co.*, 208 Fed. 869, 126 C. C. A. 27; a servant putting in new block system of signals over interstate line, *Grow* v. *Oregon Short Line R. Co.*, 44 Utah 160, 138 Pac. 398; one repairing a telegraph line of an interstate road, by which trains were directed, *Deal* v. *Coal & Coke R. Co.*, 215 Fed. 285; one sweeping snow from a switch of an interstate line, *Hardwick* v. *Wabash R. Co.*, 181 Mo. 156, 168 S. W. 328; an engineer making a test run of an engine to be used exclusively for interstate commerce, such test run being wholly within the state, *Lloyd* v. *Southern Ry. Co.*, 166 N. C. 24, 81 S. E. 1003. Probably the most extreme decision under this doctrine is that of *Cousins* v. *Ill. Cent. R. Co.*, 126 Minn. 172, 148 N. W. 58, in which it was held that an employee of an interstate carrier injured while wheeling coal for the shop in which the other employees were repairing cars used in interstate commerce, was so engaged in interstate commerce as to come within the act. Summing up the better and more generally recognized rule, the court in *Northern Pacific Ry. Co.* v. *Maerkl*, 198 Fed. 1, 117 C. C. A. 237, says: "it is equally plain that those engaged in the repair of such car are as much engaged in interstate commerce as * * * any of the operatives who [after it is returned again to such active service] handle it in such traffic." The Texas court in *Missouri, K. & T. Ry. Co. of Texas* v. *Denahy*, (Tex. Civ. App. 1914), 165 S. W. 529 holds: "that such employee is so engaged [in interstate commerce] when such car is *intended* to be used in interstate commerce on being repaired." And the spirit of that decision seems to be that if such car had previously, and up to the time of internment for repairs, been used in interstate commerce, then the presumption is that it is intended to be kept in such service, unless it be affirmatively shown by the defendant that the contrary is true. This view is the better, and is the one almost universally followed by the courts. H. R. H.